Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Telehealth and	)	WC Docket No. 17-310
Telemedicine in Rural America	)	

ADDITIONAL COMMENTS OF GCI COMMUNICATION CORP.

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I. INTRODUCTION AND SUMMARY.

GCI Communication Corp. ("GCI") responds to the Commission's December 4, 2018 Public Notice seeking additional comment on determining urban and rural rates in the Rural Health Care Telecommunications Program ("RHC" or "RHC Telecom Program").[1]

The basic construct underlying 47 U.S.C. § 254(h)(1), establishing the RHC Program, is simple: A rural Healthcare Provider (or "HCP") can purchase telecommunications services from a service provider at the rate an urban counterpart would pay for similar services, and the service provider will be reimbursed for the difference between that urban rate and the rate the rural HCP would otherwise have to pay for the services. The Commission's implementation of Section 254(h)(1) sensibly adopted a competitive bidding requirement to determine the rural rate.[2] Unfortunately, the Commission did not stop at this easy-to-implement, market-driven framework. It also promulgated a complex, multilayered regulatory backstop[3] to second-guess the results of the competitive bidding process. That non-statutory backstop is outdated, unnecessary, and difficult to administer, and it leads to substantial regulatory and investment uncertainty. Moreover, it fails to acknowledge that, outside of the RHC Telecom Program, the Commission now has largely abandoned *ex ante* rate regulation as not only inefficient, but arbitrary and detrimental to the deployment of advanced broadband networks.

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1 *See Wireline Competition Bureau Seeks Additional Comment on Determining Urban and Rural Rates in the Rural Health Care Program*, Public Notice, DA No. 18-1226, WC Docket No. 17-310 (rel. Dec. 4, 2018) ("*Public Notice*"). Pursuant to the Public Notice seeking comment on GCI's Application for Review ("AFR"), GCI is also filing these comments in support of its AFR. *See Wireline Competition Bureau Seeks Comment on GCI Application for Review*, Public Notice, WC Docket No. 17-310 (rel. Jan. 2, 2019).

2 *See Federal-State Joint Board of Universal Service*, Report & Order, 12 FCC Rcd. 8776, 9133 ¶ 686 (1997) ("*RHC Program Cap Analysis*").

3 *Id.* at 9119–33 ¶¶ 657–85.

Today, more than 20 years after the passage of the Telecommunications Act of 1996—and in the wake of the Commission's deregulation of interexchange services and most business data services—the RHC Telecom Program rules should be dramatically simplified in light of the broader evolution of the Commission's regulatory approach. This simplification should reflect a single, fundamental principle: With respect to specific services in a particular market, *there should be only one set of pricing rules*.

For rural rates in the Telecom Program, the pricing rules should be those that the Commission has applied to the same services purchased in the broader, non-RHC market in the same area. Thus, if the Commission has forborne from *ex ante* rate regulation for specific services in a given geography, then that forbearance supplies the rules (or deliberate absence thereof) that also govern rural rates for services under the RHC Telecom Program support mechanism. In contrast, if *ex ante* rate regulation is still in place, those rules would apply to RHC rates as well. But there should not be a secondary system of rate regulation for the RHC Telecom Program.

The current approach—competitive bidding with a multilayered regulatory backstop—lacks certainty or predictability, which risks unsettling the RHC Telecom Program and any rural market in which HCPs are among the most significant bandwidth purchasers, such as rural Alaska. Moreover, competitive markets determine reasonable rates much better than regulators. Therefore, competitive bidding should govern rural rates for any services not subject to *ex ante* rate regulation, which will control rates through actual and potential competition, just as the Commission has found that actual and potential competition disciplines prices when services are provided to entities other than rural HCPs.

This dramatically simplified mechanism, which closely follows the statute, has substantial advantages over the Commission's current overly complicated approach. First, rural rates would be knowable by all interested parties before the provision of services—they are the rates established through the competitive bidding process and whatever pricing mechanism applies to these services generally outside of the RHC context.

Second, relying on competitive bidding will also simplify administration of the program. While USAC and the Commission can and should ensure that "fair and open" competitive bidding occurs, permitting the market to set prices embodies the "pro-competitive, deregulatory"[4] approach contemplated by the Telecommunications Act of 1996.[5] It also appropriately reflects regulatory humility with respect to the fundamental and inherent limitations of pricing regulations, with the potential for regulators to be wrong in a way that harms network deployment and investment. Notably, the Healthcare Connect Program, under which the majority of RHC funding is issued, relies on competitive bidding with no system of backstop price regulation.

Relying on competitive bidding without an RHC-specific price regulation backstop also avoids significant practical complications arising under the current rules.[6] Comparing rural rates between a non-RHC customer and an RHC customer creates questions as to whether the services or circumstances are comparable or "like," and whether the customers are similarly situated.

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4 H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 124, 124.

5 Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 5 ("1996 Act") (codified as interspersed amendments to the Communications Act).

6 *See* 47 C.F.R. § 54.607 (providing "rural rate" review criteria, under which the "rural rate shall be the average of the rates actually being charged to commercial customers, other than health care providers, for identical or similar services provided by the telecommunications carrier providing the service in the rural area in which the health care provider is located").

These questions can be difficult because modern telecommunications contracts account for myriad factors, including volume and term, service speeds, and quality, all of which change rapidly and dynamically over time. Permitting the market to set prices also avoids the Commission having to assess whether a facility is subject to significant economies of scale and scope, which vary among technologies. For example, fiber has relatively low incremental costs of added capacity, whereas satellite transponder capacity has relatively high incremental costs.

Furthermore, GCI's experience over the course of this year has shown that trying to establish cost-based rates in a competitive market leads to uncertainty, is time- and resource-intensive for both the carrier and the Commission, cannot be performed in a way that economists would endorse as economically rational, is fundamentally inconsistent with volume and term contracts, and generally leads to under-recovery of costs in a competitive market. GCI's experience also demonstrates perhaps the Commission's most fundamental concern with *ex ante* price regulation outside of the RHC Telecom Program: that cost-of-service, rate-of-return regulation—which encourages inefficiency, discourages innovation, and is subject to regulatory errors that can stunt investment—will inhibit rather than encourage the deployment of advanced broadband networks.

Finally, with respect to *urban* rates, the Commission should consider publishing lists of commercially available urban rates at common increments of capacity, or authorizing state commissions to do so. The Commission should be careful to hew to the intent of the 1996 Act and use rates that are commonly quoted in the marketplace, such as by surveying quotes provided by companies that supply online quotes. Setting these rates above prevailing market rates in urban areas (which are likely to be lower than any publicly available urban rates) will frustrate Congress' statutory scheme in Section 254(h)(1)(A).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

A. Factual Background.

GCI set forth a detailed factual background of its participation in the RHC Telecom Program in its opening comments,[7] and therefore offers only a brief summary here. The RHC Telecom Program is both critically important and extremely successful in Alaska. Alaska is geographically and demographically unique—over four times the size of California, yet with an estimated population of only 737,080—and therefore presents unparalleled challenges to the delivery and provision of quality healthcare. Many rural Alaskan communities are hundreds of miles from the nearest highway and accessible only by airplane, boat, or snow machine. Approximately 117 villages have fewer than 100 residents.

For many of Alaska's residents, telemedicine is the only way to receive healthcare, and it is a mainstay of the state's HCPs. Alaska leads the way in developing innovative healthcare platforms and networks to reach rural residents, including a network of over 550 non-physician Community Health Aides and Practitioners serving more than 170 remote villages.[8] These providers use telemedicine to conduct triage; to determine when a patient can be treated locally rather than being flown to Anchorage; to enable the exchange of documents and images; to conduct patient education; and to provide doctor-led consultation and treatment, including psychiatry.[9] Psychiatry provides a dramatic example of the need for telemedicine: A 2016

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7 *See* Comments of General Communication, Inc. at 4–15, WC Docket No. 17-310 (filed Feb. 2, 2018) ("GCI Opening Comments").

8 *Welcome to the Alaska CHAP Program*, Alaska Community Health Aide Program, http://www.akchap.org/html/home-page.html (last visited Jan. 3, 2019).

9 Stewart Ferguson et al., *The Impact of Telehealth in Alaska*, Alaska Native Tribal Health Consortium, at 10–11 (Dec. 10, 2009), http://www.slideshare.net/HINZ/impact-of-telehealth-in-Alaska.

survey found just four licensed psychiatrists outside of Anchorage, Fairbanks, Juneau, and their nearby communities, with none in western or northern Alaska.[10]

Looking to the future, it is clear that Alaska rural HCPs will continue to seek increased bandwidth as they expand their broadband-based health services delivery. Most of rural Alaska previously depended on C-band or Ku-band geostationary satellite technology to transport traffic across the middle mile. While satellites remain necessary to reach the most remote locations, other facilities that increase available capacity and reduce latency have now been deployed to regional centers and some villages. Recognizing the need for additional infrastructure and middle-mile connectivity in rural Alaska, GCI acquired United Utilities in 2008, along with its western Alaska network, from which GCI built out and deployed its TERRA network. TERRA was western Alaska's first terrestrial middle-mile network connecting back to Anchorage and the Internet. TERRA now delivers high-speed broadband services to 45,000 Alaskans in 84 rural communities scattered across an area the size of the state of Texas. In the wake of GCI's efforts, other providers have added terrestrial facilities to some regional centers and villages.

In sum, GCI has played a fundamental role in the growth of broadband infrastructure to meet expanding demand for services in rural Alaska, investing more than $3 billion over the past three decades to bring modern communications services to remote parts of the state. The RHC Telecom Program has, in turn, been critical to the innovative growth of telemedicine in Alaska. Unsurprisingly, given its uniquely large rural area, Alaska has been a top beneficiary of RHC Telecom Program disbursements since 2002, and currently receives 25 percent of nationwide

[10] Alaska Div. Pub. Health, Health Planning and Sys. Dev., Alaska 2015-2016 Primary Care Needs Assessment I-15 tbl.5 (May 20, 2016), http://dhss.alaska.gov/dph/HealthPlanning/Documents/Primary%20Care%20Needs%20Assessment/AlaskaPrimaryCareNeedsAssessment_2015-2016.pdf.

RHC Telecom Program funding. Indeed, as a practical matter, the RHC and E-Rate programs are overwhelmingly responsible for spurring rural broadband deployment in sparsely populated and remote areas of Alaska—thereby improving both the availability of telecommunications services and the quality of life for rural residents, while dramatically reducing healthcare costs.

B. Overview of this Proceeding.

As the Public Notice indicates, the Commission's *2017 Promoting Telehealth Notice and Order*[11] proposed a new set of urban and rural rate rules intended to "increase transparency and predictability for participants in the RHC Telecom Program by requiring urban and rural rates to be determined based on more detailed criteria and by providing participants more flexibility in justifying the rates used to determine program support."[12] Specifically, the *2017 Order* proposed that rural rates would be the average of all publicly available rates in a given rural area, rather than only the service provider's own rates.[13] Moreover, if the only available rates are the service provider's own rates, the provider would use the rates in a comparable rural area where at least one other provider offers functionally similar services.[14] The Commission also sought comment on whether to retain the third prong for justifying rural rates under Section 54.607(b)—obtaining approval for cost-based rates.[15]

For urban rates, the Commission proposed requiring a rate average and sought comment on the best sources for the necessary data.[16] It also sought comment on whether to adopt a

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[11] *Promoting Telehealth in Rural America*, Notice of Proposed Rulemaking & Order, 32 FCC Rcd. 10,631 (2017) ("*2017 Promoting Telehealth Notice and Order*" or "*2017 Order*").

[12] *Public Notice* at 2.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

median-based approach rather than an averaging approach.[17] Finally, the Commission sought comment on how to define the geographic boundaries of urban and rural areas.[18]

The Public Notice recognizes that commenters might have gained additional insight into the application of the urban and rural rate rules since the comment period closed.[19] Since that time, USAC has conducted extensive reviews of program applications, and the Wireline Competition Bureau ("Bureau") has examined cost-based rate materials submitted by several carriers.[20] The Public Notice accordingly seeks to "allow parties to supplement the record with any new information or arguments pertaining to the pending urban and rural rate issues and proposals."[21]

III. THERE SHOULD BE ONLY ONE SET OF PRICING RULES: THE RHC PRICING RULES SHOULD BE THE SAME RULES THAT APPLY GENERALLY TO THE SAME SERVICES IN A GIVEN MARKET.

As set forth above, the *2017 Order* proposes to revise rather than eliminate Section 54.607's multilayered regulation of rural rates. But such complex rate regulation is outdated, unnecessary, unpredictable, and difficult to administer. Notably, the *2017 Order* never explains why its multilayered backstop to competitive bidding continues to be needed in a competitive telecommunications marketplace—a telling omission. Notably, the Healthcare Connect Fund, which the Commission created in 2012, has no multilayered rate regulation backstop. In keeping with the Commission's focus on the importance of sound economic analysis,[22] the RHC Telecom

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17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 3.

22 *See* Press Release, FCC Opens Office of Economics and Analytics (Dec. 11, 2018).

Program rules should be dramatically simplified and aligned with economic principles and conclusions that the Commission applied to the same services sold outside the RHC Telecom Program, like it already has for the Healthcare Connect Fund. With respect to specific services in a particular geographic market, there should be only one set of pricing rules for the market, including both the RHC Program and sales to other users.

A. The Commission's Move Toward Market-Based Rates Makes the Proposal for the Continued Multilayered Backstop to Competitive Bidding Irrational and Impossible to Administer.

The Commission initially implemented the RHC Telecom Program in 1997, when the process of detariffing long distance rates was just beginning.[23] The packet-based Ethernet services that HCPs often require did not exist for commercial service. When the Commission adopted the "rural rate" backstop review criteria of Section 54.607, it therefore assumed that HCPs would be purchasing TDM-based T-1 services and that publicly available, tariffed rates would be available from virtually all carriers in all geographies. In the regulatory world of 1997, cost-justification of a carrier's rates likely would have been needed only where that carrier was the sole provider of telecommunications services, in remote areas where the carrier had no other customers. And in that case, cost justification would have been easy, because the carrier would already have tariffed its own rates through the FCC's or the state's tariffing processes.

Over the past two decades, however, the available types of business voice and data services and the Commission's overall approach to regulation have changed dramatically, while the Commission's RHC Telecom Program rules have not kept pace. In contrast to the regulatory

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[23] *See, e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report & Order, 11 FCC Rcd. 20,730 (1996) ("*Interstate Interexchange Marketplace Order*"); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Order on Reconsideration, 14 FCC Rcd. 6004 (1999) (following remand of the first decision by the D.C. Circuit).

regime of 1997, the Commission now relies primarily on private negotiations in competitive markets to regulate both long distance and Ethernet service rates. Today, *no* packet-based business data services ("BDS") are subject to rate or tariffing regulation,[24] and even DS-1 and DS-3 special access services are being mandatorily detariffed across the vast majority of the country.[25] Without tariffs, publicly-available rates are the exception rather than the rule. Moreover, the current rates that carriers charge outside of the RHC Telecom Program have not undergone any form of Commission review. Therefore, any proposal that relies on publicly available rates is anachronistic.

Significantly, the Commission has opted to deregulate markets and has mandated detariffing for these types of data services both where competition is fully developed *and* where it continues to emerge. As the Commission indicated in the *BDS Order*, "[w]e further find that packet-based services are best not subjected to tariffing and price cap regulation, *even in the absence of a nearby competitor*."[26] The Commission noted that, in its view, *potential* BDS competitors "constrain[] pricing by . . . participating in similar customer service bidding requests" even "without any physical presence of the potential competitor in the nearby geography."[27] Moreover, the Commission explained that potential new competitive entrants must be given incentives to invest in new networks or facilities and to realize a return on their investment.[28]

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[24] *Business Data Services in an Internet Protocol Environment*, Report & Order, 32 FCC Rcd. 3459, 3557 ¶ 237 (2017) ("*BDS Order*").

[25] *See* 47 C.F.R. §§ 61.201 (Price cap ILECs), 61.203 (CLECs).

[26] *BDS Order* at 3500 ¶ 88 (emphasis added).

[27] *Id.* at 3490 ¶ 67.

[28] *Id.* at 3501–02 ¶¶ 92–93, 3505 ¶ 101, 3517–18 ¶ 127.

Thus, the Commission now relies on the market to set rates for Ethernet and most other business data services. Accordingly, there is no coherent basis for applying strict regulatory rate reviews to RHC-purchased services, which also are BDS, while applying no such reviews to purchases of the same services by non-healthcare providers outside of the RHC context. The distinction is entirely arbitrary.

The *2017 Order* nonetheless proposed to keep, as a backstop to competitive bidding, the calculation of rural rates by averaging all publicly available rates in a given rural area. However, this proposal ignores the fact that the Commission's move to market-based rates through detariffing resulted in the concomitant disappearance of most publicly available rates where services are detariffed. Thus, the Commission's proposal to average publicly available rates to determine the rural rate is not founded on market reality.

Nearly all BDS are now sold through private negotiations and usually are subject to non-disclosure agreements. As a result, the Commission cannot rationally maintain that relying on publicly available rates to establish rural rates is a meaningful option when, through detariffing, it has fostered an environment where public rates for the broadband services that RHCs purchase are generally unavailable.[29] Moreover, the Commission cannot solve this problem through mandatory public disclosure because it has already determined that such disclosure lowers incentives for discounting and for providing targeted service offerings while raising opportunities for tacit price coordination.[30] Indeed, in order for the calculation of the rural rate based on the average of publicly disclosed rates to be an effective backstop to competitive bidding, as envisioned by the *2017 Order*, the Commission would have to *undo* its deregulatory

[29] In Alaska, GCI alone publishes its middle-mile rates, in furtherance of the nondiscrimination provisions of its BIP grant.

[30] *Interstate Interexchange Marketplace Order* at 20,760–61 ¶ 53.

detarrifing decisions on BDS in the commercial context to implement its proposed, more heavily regulatory approach for BDS in the RHC context. This move would be wholly at odds with the Commission's market-based focus.

The *2017 Order's* proposal to continue the multilayered backstop to competitive bidding also ignores the Commission's acknowledgement that any rate regulation scheme is "complex and not easily administrable."[31] But, ironically, the multilayered backstop rate review of Section 54.607 is far more burdensome and difficult to administer than the price cap regulation that the *BDS Order* rejected. Indeed, the Public Notice here specifically acknowledges that the current approach to calculating and justifying rural and urban rates—which the *2017 Order* proposes to retain—requires USAC to complete "extensive reviews" of RHC applications.[32] These reviews necessitate "substantial effort by health care providers, service providers, and Bureau staff,"[33] making them time-consuming and resource-intensive for all parties involved. And because such reviews are never completed prior to the delivery of service, they also engender substantial uncertainty and regulatory risk for program participants.

Importantly, the proposed rate regulation of RHC-supported services reintroduces the potential for regulatory disincentives to broadband deployment, which the Commission sought to avoid when it eliminated rate regulation for packet-based BDS and for most TDM-based BDS. Where service prices are potentially supracompetitive, the Commission has considered whether to engage in *ex ante* rate regulation of BDS, or to rely on potential market entry to discipline

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[31] *Id.* at 3500 ¶ 87. The Commission also declined to adopt benchmark pricing for certain incumbent LECs and TDM-based services for similar reasons, noting that the "proposals in the record were administratively complex and unlikely to reliably result in just and reasonable rates." *Id.*

[32] *Public Notice* at 2.

[33] *Id.*

rates over time. In its *BDS Order*, the Commission chose to rely on the market, observing: "[A]ll else equal, we expect competitors will be particularly likely to build out to [the most profitable] locations," thereby lowering prices to sustainable levels through "localized competitive pressures."[34] As a corollary to this principle, setting artificially low rates creates a severe disincentive to invest in a given market.[35] Error in the rate regulation of services provided under the RHC Telecom Program has the potential to be particularly damaging because rural areas lack significant commercial demand for enterprise broadband services. If the service rates for the largest purchasers in these areas—health care providers—are forcibly set too low, rural areas are unlikely to see economically feasible investment, just as would be the case if BDS rates to all customers were set too low.[36]

Furthermore, the backstop rules themselves can result in uneven and differential impact on competing providers serving the same market. For example, consider the impact of the backstop rules where an HCP is located in an area with two providers; one provider provides a comparable BDS service to a commercial customer but is subject to mandatory detariffing and does not otherwise voluntarily publish its rates (Provider A), and the other provider only provides service to an HCP (Provider B). With no publicly available rates, the backstop rules would limit Provider B's rural rate to a cost-based rate, regardless of how that rate compares to Provider A's rate. This disrupts the market for both providers. Provider A can continue to charge the market-based rate to its commercial customer but will likely never win a bid for the HCP service, while Provider B is forced to use a rate divorced from what the market will support

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[34] *BDS Order*. at 3482 ¶ 44.

[35] *See id.* at 3484 ¶¶ 51–52.

[36] *See id.*

and what would be deemed reasonable if Provider A were the only provider in the market. Thus, Provider B is disincented from deploying services in this market solely because Provider A's rates are not publicly available, and Provider A is disincented from bidding because it would need to lower its rates beyond the rates supported in a rationally functioning market.

The impact on the market is further exacerbated if Provider A is a facilities-based provider and Provider B is a reseller of Provider A's services. In this scenario, it would be impossible to regulate the reseller's rates in a way—such as by setting margins—that did not distort the market and disincent both providers from providing the service.

In sum, outside of the RHC Telecom Program context, the Commission has largely moved away from rate regulation in favor of allowing the market to set rates. The same factors motivating this change are present with respect to services provided under the RHC Telecom Program. In addition, the Commission's deregulation of BDS renders the current RHC rate-setting rules and the changes proposed in the *2017 Order* irrational and impossible to administer.

B. The Commission Should (1) Reaffirm that "Fair and Open" Competitive Bidding Is the Proper Market-Driven Mechanism to Set Rural Rates and (2) Eliminate Section 54.607's "Check" on the Market.

Given the theoretical and practical undesirability of rate regulation, the Public Notice reflects a misplaced focus on how to "calculate" or "justify" rates for the RHC Telecom Program. The right question is not how to "calculate" rates, but how to set rates for services in a market that the Commission has already found to be sufficiently competitive to eliminate *ex ante* rate regulation. In this scenario, there is no need to "justify" rates, and the only requisite

"calculation" becomes exceedingly simple: Subtract the urban rate from the market-based rural rate to determine the reimbursement amount for the carrier.[37]

When the Commission implemented rules for the RHC Telecom Program more than 20 years ago, it correctly recognized that competitive bidding would determine rural rates consistent with the Commission's move to market-driven rates. The Commission found that "fiscal responsibility compels us to require . . . competitive bids," which are "the most efficient means for ensuring that [Program participants] are informed about all of the choices available to them."[38] Today, competitive bidding is the primary method of determining appropriate rates for RHC-supported services.[39]

The rules in Section 54.607 were not adopted to supplant competitive bidding, but rather were intended as an extra "check" or "backstop" to the competitive market. When the Commission adopted rules for the Healthcare Connect Fund in 2012, it also relied on "fair and open" competitive bidding, with a requirement that the HCP select the most cost-effective bid, as its means of ensuring that HCPs received reasonable prices.[40] Notably, the Commission did not adopt any "backstop" rules requiring comparable commercial sales, publicly available rates, or cost-based rate justifications for the Healthcare Connect Fund, presumably because such requirements are not necessary where competitive bidding in competitive markets is used to establish the rate.[41]

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37 *See* 47 U.S.C. § 254(h)(1); 47 C.F.R. § 54.609.

38 *RHC Program Cap Analysis* at 9029 ¶ 480.

39 *See, e.g.*, Letter from John T. Nakahata et al., Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur., at 12 (June 18, 2018).

40 47 C.F.R. §§ 54.642–644; *Rural Health Care Support Mechanism*, Report & Order, 27 FCC Rcd. 16,678 (Dec. 21, 2012) ("*Healthcare Connect Fund R&O*").

41 *Healthcare Connect Fund R&O* at 16,777 ¶ 227 ("Competitive bidding remains a fundamental pillar supporting our goals for the Healthcare Connect Fund, as it will allow

In Alaska, the market *is* competitive. The Requests for Proposals ("RFPs") issued by HCPs under the RHC Telecom Program often attract multiple bidders, such as ACS, Leonardo DRS, AT&T, and GCI. New competitors, including Quintillion (a fiber provider that sells capacity to Alaska local exchange carriers) and multiple satellite providers, are entering the market or plan to do so. [42] In these circumstances—where services for RHC providers *are* "subject to competition"—the Commission has correctly found that "anchor or benchmark pricing is unnecessary and could in fact inhibit investment in this dynamic market by preventing providers from being able to obtain adequate returns on capital."[43]

Given the Commission's vigorous endorsement of market pricing for the BDS market generally and its framework for the Healthcare Connect Fund, its reluctance to take the same step for the same services in the RHC Telecom Program is confusing and contradictory. However, if the Commission is concerned about the results of competitive bidding in the RHC context, the Commission should regulate that *process* rather than re-incorporating outmoded rate regulation. For example, the Commission could enhance the competitive bidding process, such as through a review of requests for proposals ("RFPs") both to ensure that they are not inappropriately exclusionary and as a safety net against flaws in the RFPs themselves. The Commission or USAC could also help HCPs review bids to ensure they are considering all appropriately responsive bids. Such steps would help to alleviate the Commission's concern while ensuring

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HCPs to obtain lower rates (thereby increasing access to broadband) and increase program efficiency.").

[42] Elwood Brehmer, *Microcom Founder Launches New Broadband Satellite Project*, Alaska J. Com. (Jan. 16, 2019 3:12 PM), http://www.alaskajournal.com/2019-01-16/microcom-founder-launches-new-satellite-broadband-project#.XE9T3E1YZMw.

[43] *BDS Order* at 3500 ¶ 87.

that both HCPs and carriers can have certainty that the outcome of an RFP will be honored and not second-guessed after services have been procured and delivered.

GCI would not, however, support a process mandating that an RHC receive multiple bids. In government contracting, competitive bidding requirements are met by soliciting bids from multiple sources, even if only one entity actually bids.[44] In that instance, the government is also distributing government funds. Moreover, as discussed above, the Commission has repeatedly found that if a market is competitive, or even *potentially* competitive, the disciplining effect of competitive bidding on prices will exist. In the *BDS Order*, the Commission wrote:

> [C]ompetitors outside of [a] customer's location can affect pricing [by competitive bidding] because the winning bid represents the competitive offer that others must beat, even if that competitor does not already have facilities in the customer's building. . . . Thus, the geographic range of the competition posed by a business data services provider is not limited to the specific locations of active circuits sold at a particular point in time.[45]

Of course, if a market is *not* competitive, the Commission could determine not to deregulate it from *ex ante* regulations—but this is not an issue specific to the RHC Telecom Program.

Finally, it bears emphasis that relying on market-driven rates appropriately acknowledges the risks of regulatory error inherent in ratemaking, which the Commission has recently emphasized:

> [I]t is very difficult . . . for a regulator to estimate the efficient price level in a business with the following characteristics: high uncertainty due to frequent and often large unforeseen changes in both customer demand for services and network technologies that are hard to anticipate and hedge against in contracts with customers; a complex set of products and services, which are tailored to individual buyers; costs of provision that vary substantially across different customer-provider

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[44] *See* FAR 6.102 (containing no requirement that multiple bids be received in order to constitute appropriate "competitive procedures").

[45] *BDS Order* at 3483 ¶ 46.

> combinations, and large irreversible sunk cost investments that a provider is required to make before offering service.[46]

Of course, these findings with respect to BDS generally are also true with respect to any attempt to determine prices for Ethernet services provided to HCPs. Demand can fluctuate as HCPs conduct competitive bidding with the potential to shift demand among multiple potential providers for multiple years. Demand is also subject to any errors that an HCP may commit in running its competitive bidding process or in interacting with USAC. Yet the facilities that are necessary to fulfill HCP demand for telecommunications services, such as the TERRA network, require large, irreversible sunk-cost investment before offering the service. Permitting the market to set prices for these services appropriately reflects regulatory humility with respect to the fundamental and inherent limitations of regulations that create the potential for regulators to be wrong.

IV. GCI'S RECENT EXPERIENCE WITH HEIGHTENED REVIEW PROCESSES UNDER RECENT INTERPRETATIONS OF CURRENT RHC RULES FURTHER ILLUSTRATES SPECIFIC FLAWS IN THE CURRENT AND PROPOSED APPROACH.

GCI's experiences over the last year, with both the USAC review process and the review process for seeking cost-based-rate approval, provide a real-world window into the difficulties of administering the RHC Telecom Program's backstop rules. These experiences underscore the need for a single set of RHC pricing rules consistent with the general rules applicable to specific services in a given market.[47]

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[46] *Id.* at 3517–18 ¶ 127.

[47] For more detailed discussion of these issues, see Application for Review of GCI Communication Corp., WC Docket No. 17-310 (filed Nov. 9, 2018) ("GCI Application for Review").

A. "Backstop" Rules Requiring Comparisons of Customers and Services Present Serious Administrability Problems.

Under both the existing RHC rules and the proposed modifications, permissible rates are determined, if possible, by averaging the rates for functionally similar services.[48] But ratemaking based on comparing the functionality of services in a given area is difficult to administer. It gives rise to tough questions about what services are "comparable" and often yields very few comparable rates, especially across vast service areas, like those in Alaska.

First, identifying comparable services is inherently complex because the volume, term, and mix of services that customers purchase is highly varied. On one hand, volume and term discounts benefit both the buyer and the seller, with the purchaser receiving more options and benefiting from lower rates, and the seller getting a more stable and predictable stream of revenue. On the other hand, such variations mean that, even when the type or speed of service is the same, the services are not necessarily comparable from a pricing perspective. Ignoring the price differences that stem from these types of purchasing choices would require service providers to absorb the burden of lighter purchasers, which might discourage them from offering bulk or term discounts and increase the prices to be supported by USF. Moreover, some technologies are subject to rate compression or significant economies of scale and scope, while others are not. The end result is that, even when services might appear functionally similar to the end user, the purchasing preferences of a particular customer and the technologies used to deliver a service might differ such that the prices should not be considered comparable. Of course, the end user HCP is, in any event, required to select the most cost-effective bid for the services it

[48] 47 C.F.R. § 54.607(a); *2017 Order* at 10,652 ¶ 64.

needs; so in the case of different technologies with different prices, the purchaser must still consider whether its needs justify selecting a higher priced service.[49]

GCI's recent experience with the USAC and Bureau review processes also revealed additional serious concerns about the administrability of the comparability requirement. First, USAC and the Bureau for the first time revealed that they now read Section 54.607(a) to require comparing similar services in the same safe harbor category based on *absolute price* rather than accounting for price differentials based on the range of service bandwidth within the safe harbor category.[50] This was a novel interpretation, inconsistent with prior USAC reviews and audits.[51] In any event, the only reasonable way to calculate the rural rate—and to do so in a way that adheres to the statute—is to identify a common *per-unit price* measure for the comparable services within the safe harbor category, such as the per-Mbps price, and use that measure to interpolate the rural rate.[52] For example, in the DS3 safe harbor range of 8.1 Mbps to 50 Mbps, USAC and the Bureau read Section 54.607(a) to require the averaging of the absolute price of a 10-Mbps service with the absolute price of a 50-Mbps service to arrive at the rural rate for any other service within the safe harbor—for instance, a 20-Mbps service. By contrast, GCI believes the only reading of the rules that is consistent with the statute is to average the *per-Mbps* price of the 10-Mbps service with the per-Mbps price of the 50-Mbps service to determine the rate for a 20-Mbps service. For instance, averaging the absolute price of a 50-Mbps service that sold for $50,000 and a 10-Mbps service that sold for $10,000 would result in a rural rate of $30,000 for the 20-Mbps services (and for any other service in that safe harbor tier). But averaging the

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[49] *See* 47 C.F.R. § 54.603(b)(4).

[50] *See* GCI Application for Review at at 8–9.

[51] *See id.* at 24–25.

[52] *Id*.

service by the common unit of each service—per Mbps— results in a per-Mbps average of $1,000. Under this approach, the rural rate for the 20 Mbps service would be $20,000 (or, for example, $30,000 for a 30-Mbps circuit). Using the new USAC and Bureau endorsed approach, service providers might be compensated more than, or less than, the difference between the urban rate and the rural rate, either of which conflicts with the purpose of the statute.

In addition, it can be difficult or impossible to find a sufficiently large pool of comparables to create a meaningful average, particularly in rural areas where populations are low and build-out is sparse. GCI's interactions during heightened review revealed that USAC and the Bureau read Section 54.607(a) and (b) to necessitate comparing rates for end-to-end circuits via the same method—rather than permitting different *components* to be compared using different methods (e.g., comparable rates for middle mile service services, and third party tariffed rates for local channel terminations). This adds an additional layer of difficulty in calculating the rural rate because it limits comparability to specific routes between communities. For example, some segments of a circuit, such as the middle mile interexchange transport, are priced similarly across a broader geography than the local connections at either end, so analyzing pricing at the level of the segment rather than the entire end-to-end circuit would expand the pool of comparables for broader segments. GCI found the position of USAC and the Bureau both surprising and illogical, especially since a service purchased from tariffs would commonly combine services purchased from different parts of a tariff or even different tariffs.

The rule changes proposed in the *2017 Order* do not address the comparability problems with anything other than wishful thinking. As discussed above, the insufficient pool of rates is only minimally addressed by from averaging a service provider's own rates to averaging all publicly available rates for "identical or similar services," as well as by requiring the provider to

use rates from a comparable rural area if the only publicly available rates in the provider's area are its own rates.[53] As explained, the proposed expansion of the pool of available rates is just a mirage due to mandatory detariffing. In the likely event that there are no publicly available rates in that geography or any comparable geography, then the provider remains with the same limited pool as today. In addition, determining a comparable rural area injects a further level of complexity into the comparability problem by necessitating an analysis of which rural areas are comparable.

Moreover, the proposed rule changes do nothing to mitigate the issue of identifying comparable services. In fact, the proposal might further muddy the waters by requiring undiscounted rates offered through the E-Rate Program to be included in the rate average. GCI's experience raises concerns regarding how USAC and the Bureau understand comparable rates in this context. The Bureau requested that GCI include its rates under the E-Rate Program in its comparables for calculating the rural rate. The Bureau then provided a list of specific E-Rate customer rates that the Bureau thought GCI should use to calculate the rural rate. Some of those provided rates were not actually comparable, however. For example, "best efforts" services are not functionally similar to the dedicated broadband service provided through the RHC Telecom Program.

In short, it will be difficult for providers participating in the RHC Telecom Program to compare customers and services in the way envisioned by the proposals. Accordingly, it will be difficult for USAC to conduct appropriate oversight of the rules. As a result, the administrability problems inherent in the proposed backstop rules to competitive bidding mean that the existing problems will continue, contrary to the purpose of the *2017 Order* and the Public Notice.

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[53] *2017 Order* at 10,651–52 ¶¶ 62–64.

B. Use of Cost Justification as a Backstop in a Competitive Market Is Economically Irrational, Is Unduly Burdensome, and Undermines the Sound Operation of Multiproduct Firms in a Competitive Market.

In the absence of comparable rates or publicly available rates, the rules mandate that the provider submit a cost justification for the service provided to the HCP. The Bureau and USAC have read the cost justification requirement in Section 54.607(b) to require identifying both the *revenues* associated with that specific service and the *costs* attributable to that single service. GCI's experience has shown that isolating these service-specific costs and revenues from the other costs and revenues of the multiproduct carrier simply cannot be done in an economically rational manner without grossly distorting the operation of the firm in a competitive market. In addition, the Commission must also determine the permissible rate of return—a task for which it has no experience with respect to entities that lack market power and are subject to competition.

GCI's TERRA network—which, as discussed above, is one part of GCI's overall network in Alaska—illustrates the difficulties of the Bureau's approach to revenue and cost allocation. GCI's TERRA network supports a wide range of services to rural Alaska. In addition to the high priority services purchased by HCPs, the TERRA network also supports lower priority data services purchased by E-rate and commercial customers. TERRA also provides transport to support GCI's consumer services, including mass market fixed and mobile voice and broadband services, and also to support GCI's internal operations. Because TERRA is a single network, its operating costs are 100% common to all of these services. TERRA is also not a finished final product sold to end users, but just one component of the services (i.e., the middle mile transport) that end users purchase.

These issues create a substantial potential for the FCC's cost justification review to yield a false positive—that is, to show rates of return that exceed those that the service provider actually experiences. A falsely high rate-of-return calculation in a rate-of-return-based cost

justification regime will lead to artificially depressed rates, which will reduce network investment.

1. Revenue Attribution.

Revenue attribution is not straightforward for cost justification purposes. While it is relatively easy to identify the revenue associated with specific high priority interexchange transport services sold to HCP, E-rate, and commercial customers as part of an end-to-end package of data services, attributing revenue from mass market voice and broadband services is extremely difficult, as it is generally received in connection with a broader package of services. For example, an Anchorage customer calling a person in Bethel may have purchased a statewide or nationwide calling service—but only a small portion of the revenue from that service relates to transiting the TERRA network. The same is true for the legacy mobile data services (such as 2G and 3G data) that transit the TERRA network; these are sold as part of a larger package. Although there is some contribution to the common costs of the network—and thus there is no cross-subsidy—isolating and quantifying that contribution is extremely difficult.[54]

As a practical matter, attributing revenue at a wholesale list price (as GCI did when attempting to prepare a cost study) likely *overstates* the revenue contribution. This problem becomes even more complicated if trying to assess the overall revenues attributable to TERRA as a whole. That is because TERRA supports other, lower priority services, and the mass market revenue from those services would also need to be attributed to TERRA. Significantly, however,

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[54] *See* GCI Application for Review, Exhibit C at 42 ("TERRA Brattle Group Report") (explaining that "assuming an overall competitive rate of return . . . there is no evidence of cross-subsidy if each of a firm's prices is above its average-incremental cost, or, equivalently, if each of that firm's prices is below its stand-alone cost," and that "[m]easures of incremental costs are the forward-looking costs that can be directly assigned to specific services or network elements and that do not include costs that are common among all the firm's services or shared among a subset of services").

over-attributing revenue—beyond what an economically rational network operator would do—will artificially increase the rate of return yielded by the cost study, beyond what the network operator actually experiences. This can have a significant policy implication because if the cost study is then used to set prices on the common network—here TERRA—the over-attribution of revenue to those mass market services will create a disincentive to provide the mass market services. In other words, the network operator would be better off discontinuing mass market use and eliminating the over-attribution of revenue. The TERRA cost study that the FCC used to prescribe GCI's FY2017 rural rates produces this result.

2. Cost Allocation.

The problems of cost allocation are even more intractable than those of revenue attribution. Cost allocation for a rate-of-return cost justification requires separating out the common costs of building, maintaining, and operating the network among the various grades of service, including "priority," "normal," and "best efforts" services. This task is further complicated here because Bureau staff (erroneously and contrary to the express language of Section 251(h)(1)(A)) insist that these costs must also be separated between HCPs and all other end user customers, even when those customers purchase the same grade of service as an HCP.

In a competitive market, cost recovery for common costs across multiple products does not take place according to any specific formula, but rather depends on how a firm may maximize its recovery. As a matter of economic theory, that generally means that common costs are allocated to different services using the same network in proportion to the relative elasticities of those services.[55] Common costs in a competitive market thus are *not* recovered in a fixed

[55] *See* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and the Regulatory Contract—The Competitive Transformation of Network Industries in the United States* 44

proportion according to proportion of bandwidth used, or even the "burden" the demand places on the network.

The common costs of different classes of air travel on a single flight provide an accessible example of this point. The cost of the plane itself, the fuel, the crew, and so on are all 100% common cost among all passengers and freight being carried. Yet passengers and freight fly in various classes and pay different fares, and those fares do not vary in any direct relation to the amount of square footage of the plane that the passenger or the freight occupies. First class, for example, is much more expensive than the modest difference in seat size would justify in relation to the least expensive economy fare. Even within economy class, fares vary among seats of the same size. Like other firms in multiproduct competitive markets, airlines split the 100% common costs of a flight in whatever way maximizes their ability to recover the costs, not according to any straightforward formula.

Significantly, when the Commission imposes a cost allocation methodology (e.g., a fully distributed cost methodology) that does not track the providers' own cost allocation and recovery, it not only distorts the market and artificially alters its calculation of the provider's return from that experienced in the market, but it actually condemns the provider to under-recovery.[56] In a seminal economics article, Baumol, Koehn and Willig state that when a

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(1998) ("Competitive multiproduct firms allocate common costs in inverse relationship to the demand elasticities of their respective products, much like Ramsey pricing.")

[56] The FCC has mandated various cost allocation methodologies for ILECs, but a fundamental premise behind them is that the ILECs are "dominant carriers," which, by definition, means that the Commission has found that they have market power. *See, e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report & Order, 85 F.C.C.2d 1, 6 ¶ 16 (1980) ("*Competitive Carrier First R&O*"). The FCC has never mandated cost allocation methodologies to set rates for non-dominant carriers in the absence of some finding of market power. *Cf. Rates for Interstate Inmate Calling Services*, Second Report & Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd. 12,763, 12,765 ¶ 2 ("While the Commission prefers to rely on

regulator mandates a fully distributed cost allocation methodology for a firm operating in a competitive market, the regulator necessarily will require the provider to recover less than all of its common costs.[57]

Yet, as GCI learned during its heightened review, the Bureau affirmatively chose not to defer to the market's determination of cost allocation as between priority, normal, or best efforts services, or between RHCs and all other end users. Although there was no finding or even evidence of market power, the staff rejected revenue as an allocator, even though revenue attribution is a closer proxy (although still a flawed basis) for market-based allocations. Staff instead insisted on allocating costs according to bandwidth usage, and even then were inclined to allocate costs on a "bit is a bit" basis, rejecting GCI's attempts to reflect the degree that a class of traffic contributed to the need to upgrade the network in a cost allocation methodology. None of this can be reconciled with sound economics, and it disregards entirely the teaching of Baumol, Koehn and Willig. Indeed, as those economists illustrated, the chosen method of cost allocation

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competition and market forces to discipline prices, there is little dispute that the ICS market is a prime example of market failure.").

Section 254(k) does not mandate that the FCC impose cost allocation methodologies contrary to those arrived at by the competitive market; rather, it requires that services bear a "reasonable" portion of joint and common costs and that supported services avoid cross-subsidizing competitive services. 47 U.S.C. § 254(k). A competitive market satisfies these requirements because "reasonable" can include whatever proportion of common costs the market dictates so long as the supported service bears at least some common costs, and because cross-subsidizing will not occur so long as the supported service bears at least its incremental costs, which it must do if it is also bearing some portion of common costs. *Cf.* TERRA Brattle Group Report at 33, 42 (discussing ways to evaluate cross-subsidization).

[57] W. Baumol, M. Koehn, & R. Willig, *How Arbitrary Is 'Arbitrary'?—Or, Toward the Deserved Demise of Full Cost Allocation*, Pub. Utils. Fortnightly, Sept. 3, 1987, at 17.

is so closely tied to the resulting rate of return that it renders the rate of return entirely arbitrary and illusory.[58]

Notably, these cost allocation issues become even more complex—and even more likely to create economic distortions—if cost-of-service regulation is being used to determine rates for only a subset of the circuits under the RHC Telecom Program. This could occur, for example, if there are comparable rates to non-HCPs for some bandwidths but not others. Under that circumstance, both revenues and costs with respect to the HCP circuits for which there were comparable services provided to non-HCPs would have to be removed so as not to subject those circuits to cost-of-service, rate-of-return regulation.

Relying on the market to set the rural rates for the RHC Telecom Program where the Commission has eliminated *ex ante* rate regulation based on a finding of competition, as GCI proposes, is harmonious with Baumol, Koehn and Willig's findings. Doing so would respect the cost allocations arrived at by the competitive market and thus not mandate under-recovery. Further, it would avoid setting rates in an arbitrary framework where the choice of the cost allocation methodology dictates the outcome.

3. Rate of Return.

A rate-of-return cost justification also requires the Commission to set a permitted rate of return for the services provided to the HCP. The Commission has never set a permitted rate of return for a competitive service because the Commission has never used rate-of-return regulation to set rates for a non-dominant competitive carrier. Since the Commission's Competitive Carrier

[58] *Id.* at 21 ("The 'reasonableness' of the basis of allocation selected makes absolutely no difference except to the success of the advocates of the figures in deluding others (and perhaps themselves) about the defensibility of the numbers. There just can be no excuse for continued use of such an essentially random or, rather, fully manipulable calculation process as a basis for vital economic decisions by regulators.").

proceeding in 1980, in which the Commission recognized that it should treat carriers without market power differently than carriers with market power, non-dominant carrier rates have not been subject to rate-of-return regulation.[59] Even when non-dominant carriers are required to file tariffs, those tariffs are filed on one day's notice and are presumed reasonable.[60]

The Commission has not sought comment on, and has no basis on which to prescribe, a rate of return for services to HCPs. But even more, the Commission would have to explain why it is rational to subject services to HCPs to rate-of-return regulation when the Commission has not prescribed a rate of return for the same services to any other end users.

More fundamentally, the Commission recognized almost 30 years ago that, even for dominant carriers (i.e., those with market power), rate-of-return regulation encourages inefficiency and delays innovation.[61] While a rate-of-return determination in a single year might lead to a rate reduction, over the longer term, it incentivizes, rather than limits, excessive expenses and investment.[62] It also discourages innovation that increases efficiency because the service provider cannot benefit from such investments.[63] And, as the Commission recognized in the *BDS Order*, if the Commission sets rates too low—i.e., below a competitive market return—it will simply discourage any investment in providing service to HCPs.[64] All of these prior Commission findings show that a rate-of-return backstop actually undermines, rather than

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59 *Competitive Carrier First R&O*, 85 F.C.C.2d at 6 ¶ 16.

60 47 C.F.R. §§ 1.773(a)(ii), 61.58(a)(ii).

61 *Policy and Rules Concerning Rates for Dominant Carriers*, Report & Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 2889–93 ¶¶ 30–35 (1989) ("*Dominant Carrier First R&O*").

62 *Id.* at 2890 ¶ 30.

63 *Id*.

64 *BDS Order* at 3505 ¶ 101, 3517–18 ¶ 127.

supports, the Commission's objectives for the RHC Telecom Program.

4. Multiyear Issues.

Cost justification through rate-of-return regulation also presents a number of issues when applied year over year. First, as the Commission has long recognized, rate-of-return regulation fails to create incentives to be efficient and to innovate.[65] Second, term discounts depend on the ability of the service provider to have rate stability from year to year. If the Commission continues to use a cost justification backstop, it subjects rates to annual changes. This disrupts the year-to-year stability on which term discounts are founded. Third, in a competitive market, rate-of-return regulation loses the ability to adapt to significant shifts in demand. With competitive bidding in a competitive market, an HCP has the ability to shift between service providers—something that cannot occur when there is only one provider, the situation for which rate-of-return regulation originated. If demand falls dramatically and in a manner that was not projected, the service provider subject to rate-of-return regulation will be undercompensated in the period for which rates were set because the cost justification will have projected higher revenues than were actually realized, holding rates down. In the subsequent period, however, the service provider may not be able simply to increase rates to offset the prior period loss, because competitive bidding—or multiyear contracts set in the prior year—may preclude actually charging the higher rates.

Returning to only one set of rate rules—those that apply to the service generally—and relying on competitive bidding avoids all of these problems. There is no rational basis for creating a cost-of-service overlay on the generally applicable price regulation regime.

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[65] *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report & Order, 5 FCC Rcd. 6786, 6787 ¶ 2 (1990); *Dominant Carrier First R&O* at 2893 ¶ 35.

V. ANY ADDED SAFEGUARDS SHOULD BE CAREFULLY LIMITED TO PREVENT MARKET DISTORTIONS.

The problems discussed above reinforce GCI's view that the current multilayered backstop to competitive bidding to set rural rates in the RCH Telecom Program is unnecessary and difficult to administer. The rule changes proposed in the *2017 Order* do not substantially address the problems associated with the backstop. Although Section 205 of the Communications Act authorizes the Commission to investigate a carrier's charges and to "prescribe . . . just and reasonable" ones,[66] the Commission has not articulated standards for what constitutes an unreasonable market rate charged by a non-dominant carrier. Moreover, Section 205 requires that the carrier have "full opportunity for hearing," [67] which, of course, builds transparency and fairness into the process. With no standards to guide what constitutes a cost-justified rate and no transparent process to determine or apply such standards, the Commission should decline to adopt the proposed changes, eliminate the existing multilayered backstop, and rely on competitive bidding in markets where it has removed *ex ante* regulation.

Should the Commission decide that it must adopt an additional check on competitive bidding, it should adopt a mechanism that works with, rather than against, the free and open market. It should also ensure that any mechanism it adopts embodies the light-touch, carefully limited approach the Commission has taken in other contexts. To function properly in a competitive market, a mechanism need not, and should not, be a regulatory check on prices. As discussed above, competition will discipline prices if new entrants are attracted to build.

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66 47 U.S.C. § 205(a).

67 *Id.*

One option for a light-touch check that works through the competitive bidding process is GCI's "minimum contribution" proposal offered in earlier comment cycles on this docket.[68] Under this approach, HCPs would be required to pay the greater of the urban rate or one percent of the rural rate. This amount could then be incrementally increased to up to five percent of the rural rate in order, but only if the RHC Program's funding cap is not exceeded.

This proposal will balance the Commission's concern that HCPs are not sufficiently subject to purchasing discipline with the financial realities faced by the service providers. Such an approach would permit the competitive market to function without being subjected to the distortions introduced by rate regulation. It would also serve the goals expressed in the *2017 Order* to increase transparency and predictability for participants in the RHC Program.[69] And it would be far simpler and less costly to administer than the existing and proposed alternatives.

VI. THE COMMISSION SHOULD CONSIDER ADOPTING URBAN RATES AT COMMON INCREMENTS OF CAPACITY, OR ENCOURAGING STATE COMMISSIONS TO DO SO.

As the Commission is aware, finding publicly available urban rates can be difficult for many service providers participating in the RHC Telecom Program because the relevant services are generally detariffed and carriers generally do not "voluntarily" publish rates.[70] For the most part, service providers are not required to post rates for data and IP-based services. GCI publicly

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[68] *See* GCI Opening Comments at 43–47; Reply Comments of General Communication, Inc. at 7–9, WC Docket No. 17-310 (filed Mar. 5, 2018).

[69] *See Public Notice* at 2 (citing *2017 Order* at 10,651–54 ¶¶ 60–72).

[70] *See* 47 C.F.R. § 54.605(a) (providing that "the 'urban rate' for [an eligible service funded from the Telecommunications Program] shall be a rate no higher than the highest tariffed or publicly-available rate charged to a commercial customer for a functionally similar service in any city with a population of 50,000 or more in that state").

posts its rates for MPLS services in Anchorage,[71] but it is one of the few service providers to do so.

USAC could help address this difficult aspect of the RHC Telecom Program by actively seeking information regarding service providers' urban rates. USAC could then post information regarding urban rates using common increments of capacity. Making this information publicly accessible to all participants in the RHC Telecom Program would increase transparency for the program overall and would increase certainty for HCPs who must pay the urban rate for service. As the Commission has suggested, USAC could collect and aggregate data from the prior year's RHC Telecom Program, supplemented by publicly available rate data, where it exists, and post the resulting urban rate data on its website.[72] USAC could also use information from bids or proposals for urban rates submitted by service providers as supplementary evidence regarding the publicly available rate. Alternatively, USAC could use publicly available E-rate data from services provided in urban areas to determine urban rates.[73] These rates are the result of competitive bidding, and accordingly reflect reliable, market-based results.[74] Additionally, rates under E-rate are subject to a lowest corresponding price rule.[75] USAC should ensure, however, that it examines similar services when aggregating rate information from any source. For example, it would be counterproductive to average rates for a high priority or dedicated service

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71 GCI's publicly posted MPLS rates for 2017 for Anchorage are available here: https://static1.squarespace.com/static/56aa496dd82d5e1fa024d21f/t/58ee784b29687fbef7988018.

72 *See 2017 Order* at 10,653–54 ¶ 69.

73 Open datasets for the E-Rate Program are available on USAC's website. *See USAC Open Data*, Universal Admin. Co., https://opendata.usac.org/ (last visited Jan. 3, 2019).

74 *See* 47 C.F.R. § 54.503.

75 *Id.* § 54.504(c).

with a best efforts service.[76] As explained above, differences between types of service are especially relevant to healthcare in rural areas, where many HCPs rely on the transmission of videos and images to enable patient diagnosis and care. USAC also should take care not to bias urban rates upward, such as by relying on carrier-published rate guides that may substantially exceed the actual rates negotiated.

Finally, USAC could encourage state commissions or entities to collect and share data regarding urban rates, especially in states where many HCPs rely on the RHC Telecom Program. The Regulatory Commission of Alaska, for example, has dedicated a section of its website to telecommunications programs, providing links to each year's urban rates for Anchorage for HCPs seeking information about available services.[77] Through its own research and information-sharing efforts, and through collaborations with state entities, USAC could increase transparency for service providers and certainty for HCPs by seeking information about urban rates and posting rate information in common increments of capacity. Doing so would further several of the goals stated in the *2017 Order*: improving rural HCP access to modern communications services, overcoming obstacles to healthcare delivery in isolated communities, and realizing the benefits of the RHC Program across the nation.[78]

CONCLUSION

For the foregoing reasons, the full Commission should ensure that rural rates are determined by the market, without an additional layer of rate regulation or cost studies. The

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[76] *See 2017 Order* at 10,655 ¶¶ 74–75 & n.104 (discussing whether services are "*functionally* similar as viewed from the perspective of the end user").

[77] *See Telecommunications*, Regulatory Comm'n of Alaska, http://rca.alaska.gov/RCAWeb/Programs/Telecommunications.aspx (last visited Jan. 3, 2019).

[78] *See 2017 Order* at 10,633–34 ¶¶ 2, 4.

Commission should recognize the risk that over-regulation resulting in artificially low rural rates will discourage infrastructure investment and undermine the critical goals of the RHC Program.

Respectfully submitted,

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